IN THE SUPREME COURT OF MISSOURI
EN BANC

JODIE NEVILS,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	No. SC93134
	)	
GROUP HEALTH PLAN, INC., et al.,	)	Transfer from ED98538
	)	
Defendants/Respondents.	)	

Appeal from the Circuit Court of St. Louis County
#11SL-CC00535
Hon. Thea A. Sherry, Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENTS GROUP HEALTH PLAN, INC. AND ACS RECOVERY SERVICES, INC.

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Statement Of Facts

The facts of this case are simple and largely uncontested. In 2006 and 2008, defendant Group Health Plan, Inc. (GHP, now known as Coventry Healthcare of Missouri, Inc.) entered into contracts with the federal Office of Personnel Management (OPM) to supply health insurance to federal employees under the Federal Employee Health Benefits Act (FEHBA). L.F. 35; 214. Plaintiff Jodie Nevils (Nevils) was a federal employee and received health benefits pursuant to the first of those contracts. L.F. 293 ¶¶ 24-25.

As Nevils concedes, Br. at 3, the terms of GHP's contracts with the government required GHP to subrogate FEHBA claims against third-party tortfeasors liable to the federal employee. Specifically, § 2.5 of each contract – located in the "Benefits" section of each contract – provides:

> (a) The Carrier shall subrogate FEHB claims in the same manner in which it subrogates claims for non-FEHB members, according to the following rules:
>
> . . . .
>
> (2) The Carrier shall subrogate FEHB claims if it is doing business in a State in which subrogation is prohibited, but in which the Carrier subrogates for at least one plan covered under the Employee Retirement Income Security Act of 1974 (ERISA) . . . .

L.F. 57; 143. It is uncontested that GHP subrogates for at least one ERISA plan, L.F. 218, and so was required to subrogate for FEBHA claims.

"As a condition precedent to the provision of benefits hereunder," the contracts authorized GHP to obtain such information as is "reasonably necessary" to "carry out the provisions of the contract, such as subrogation." L.F. 55; 141-42. And they further provided that, "[b]y enrolling or accepting services under this contract, Members are obligated to all terms, conditions, and provisions of this contract." L.F. 55; 141.

In November 2006, Nevils was injured in an automobile accident. He made a claim for medical benefits under his FEHBA coverage. GHP paid his claim. L.F. 31 ¶ 6. Nevils sued the other driver and recovered a settlement. L.F. 31 ¶ 6. Pursuant to its contractual obligations with OPM, GHP, through its contractor ACS Recovery Services Inc. (ACS), asserted a lien on that settlement to the extent of the benefits GHP paid. L.F. 293 ¶ 27. As required by the contract, Nevils repaid GHP the $6,592.24 that it had paid in medical benefits. L.F. 294 ¶ 32.

More than a year later, Nevils filed a class action alleging that GHP's subrogation – taken pursuant to the mandatory requirements of its contract with OPM – violated the Missouri common law prohibition against subrogation by health insurance companies. He alleged a statutory cause of action under the Missouri Merchandizing Practices Act and two common law causes of action for conversion and unjust enrichment.

GHP removed the case to federal court on the grounds that the federal government's interest in enforcing the OPM contracts meant the case was governed by federal common law, and that the federal court had federal officer

removal jurisdiction. The District Court remanded the case, finding that there was no conflict between federal law and Missouri law because Buatte v. Gencare Health Sys., Inc., 939 S.W.2d 440 (Mo. App. 1996), held that FEHBA preempted any contrary Missouri law.[1]

On remand, Nevils added ACS as a defendant. Both defendants then filed motions for summary judgment, arguing that 5 U.S.C. § 8902(m)(1) preempted Nevils' state-law claims. Section 8902(m)(1) provides that the terms of a FEHBA contract relating to "coverage or benefits (including payments with respect to benefits)" preempt any contrary state laws. App. A009.[2]

The trial court granted summary judgment in favor of GHP and ACS and the court of appeals affirmed. This Court accepted transfer of the case and now resolves it as though on direct appeal. The thesis of Nevils' appeal is that Buatte was wrongly decided and that the Court should resolve a direct conflict with FEHBA in favor of Missouri common law.

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[1] The Eighth Circuit subsequently overruled the District Court's decision expressly and by name. Jacks v. Meridian Res. Co., 701 F.3d 1224, 1232 (8th Cir. 2012).

[2] Nevils' appendix is identified as "App." and Respondents' appendix is identified as "Resp't. App."

Points Relied On

I. The Trial Court Correctly Held That FEHBA Preempts Missouri's Anti-Subrogation Rule.

A. Section 8902(m)(1) Preempts Nevils' Claim Because The Subrogation Provisions Of The FEHBA Contract "Relate To" The Provision And Payment Of Benefits Under The Plan.

Buatte v. Gencare Health Sys., Inc., 939 S.W.2d 440 (Mo. App. 1996);

Shields v. Gov't Employees Hosp. Ass'n., Inc., 450 F.3d 643 (6th Cir. 2006), overruled on other grounds, Adkins v. Wolever, 554 F.3d 650 (6th Cir. 2009);

Blue Cross Blue Shield Health Care Plan of Ga., Inc. v. Gunter, 541 F.3d 1320 (11th Cir. 2008);

Calingo v. Meridian Res. Co., 2013 WL 1250448 (S.D.N.Y. Feb. 20, 2013).

B. The Court Should Defer To OPM's Interpretation Of The Statute It Administers.

Wimberley v. Labor & Indus. Relations Comm'n., 688 S.W.2d 344 (Mo. banc 1985);

Skidmore v. Swift & Co., 323 U.S. 134 (1944);

Calingo v. Meridian Res. Co., 2013 WL 1250448 (S.D.N.Y. Feb. 20, 2013).

II. Empire Does Not Require A Contrary Result.

Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006);

Empire Healthchoice Assurance, Inc. v. McVeigh, 396 F.3d 136 (2d Cir. 2005), aff'd 547 U.S. 677 (2006);

Waller v. Hormel Foods Corp., 120 F.3d 138 (8th Cir. 1997).

III. There Is No Presumption Against Preemption In A Case Involving The Terms And Conditions Of Benefits To Federal Employees.

United States v. Locke, 529 U.S. 89 (2000);

Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001);

Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

Argument

Nevils seeks actual and punitive damages from GHP and ACS because GHP faithfully carried out its contractual obligations to OPM, an agency of the federal government. Nevils also seeks to enjoin GHP and ACS from engaging in any future subrogation, regardless of the terms of GHP's contracts with OPM.

FEHBA's preemption provision, 5 U.S.C. § 8902(m)(1), provides that the terms of such a contract relating to the "nature, provisions or extent of coverage or benefits (including payments with respect to benefits)" preempt any and all state laws relating to the contract. App. A009. Judge Russell's opinion in Buatte v. Gencare Health Sys., Inc., 939 S.W.2d 440 (Mo. App. 1996), squarely holds that "Missouri state law prohibiting subrogation is preempted by the FEHBA." 939 S.W.2d at 442. That holding is correct; under Article III of the United States Constitution, the Supremacy Clause, § 8902(m)(1) preempts contrary state law.

Nevils' argument for reversal rests primarily on a United States Supreme Court decision involving § 8902(m)(1), Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006). Empire decided a narrow question of federal jurisdiction, holding that § 8902(m)(1) did not so completely preempt the field that FEHBA subrogation claims arose under federal law. Empire did not decide – and expressly stated that it did not decide – the wholly separate issue of whether FEHBA provides a defense to the kind of claims Nevils asserts. That is the issue before this Court.

There are two kinds of federal preemption. There is complete preemption, in which federal law so completely occupies a field that the only claims available are necessarily federal. Complete preemption thus gives rise to federal subject matter jurisdiction under 28 U.S.C. § 1331. The other type of preemption is defensive preemption. Defensive preemption is an affirmative defense that defeats the plaintiff's cause of action, but does not confer subject matter jurisdiction on a federal court:

> The jurisdictional question concerning "complete preemption" centers on whether it was the intent of Congress to make the cause of action a federal cause of action and removable. . . .
>
> If the federal court rules that the claim is not "completely preempted," then the federal court has no jurisdiction to rule on a substantive defense and remand is required. The substantive defense of preemption is then a matter for the state court to determine as part of the trial proceedings. The federal court's ruling on "complete preemption" has no preclusive effect on the state court's consideration of the substantive preemption defense.

Faith Hosp. Ass'n. v. Blue Cross & Blue Shield, 857 S.W.2d 352, 355 (Mo. App. 1993).

The subrogation provision at issue is a term and condition of the receipt of health benefits by a federal employee. The State of Missouri has never attempted to regulate those terms and conditions and has no interest in doing so. By contrast, the federal government, which pays 75% of the cost of FEHBA benefits, has a

strong interest in reducing the burden on the taxpayers by requiring subrogation as a condition of receiving FEHBA benefits. As a result, there is no presumption against preemption.

Thus, every case to consider the question, whether before or after Empire, has ultimately held that § 8902(m)(1) means exactly what it says: the terms of a FEHBA contract that "relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law . . . which relates to health insurance or plans." Subrogation, by its very nature, is the act by which an insurer that has made payments with respect to benefits seeks to recover them. Thus, the subrogation provisions of the FEHBA contract "relate to" the provision of benefits or, at the very least, to payment of benefits.

Nevils' repeated argument that a statute allowing "private contracts" to preempt state law is sufficiently "unusual" to warrant a "modest" reading is incorrect. Similar provisions appear in every statute addressing federal benefit programs and in the Employee Retirement Income Security Act (ERISA). ERISA clearly provides that the terms of privately negotiated contracts supersede contrary state law. The same should certainly be true in FEHBA cases which involve contracts negotiated with federal entities like OPM.

I. The Trial Court Correctly Held That FEHBA Preempts Missouri's Anti-Subrogation Rule.

(Responds to pp. 9-11; 24-27)

The trial court granted defendants' motions for summary judgment because "Missouri law holds that FEHBA preempts Missouri's anti-subrogation law." App. 005. The plain terms of § 8902(m)(1) and the contracts that GHP had with OPM support that holding. So does the agency responsible for administering FEHBA – OPM – to whose conclusions this Court should defer.

A. Section 8902(m)(1) Preempts Nevils' Claim Because The Subrogation Provisions Of The FEHBA Contract "Relate To" The Provision And Payment Of Benefits Under The Plan.

Section 8902(m)(1) provides that the terms of a FEHBA contract that "relate to" the provision of benefits under the plan preempt state law. The section provides:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

The Supreme Court of the United States has repeatedly held that the phrase "relate to" expresses a "broad" and "expansive" preemptive purpose, "conspicuous for its breadth." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383-84

(1992), and cases there cited. In construing the identical phrase in ERISA, the Court held that a "law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983).

For two separate reasons, the subrogation provision "relates to . . . coverage or benefits (including payments with respect to benefits)." First, Nevils' obligation to honor the subrogation agreement was a condition to the receipt of benefits. Second, the very act of subrogation – recovering benefits previously paid – necessarily relates to the payment of those benefits.

Part II of each OPM contract is entitled "Benefits." It contains three provisions which, collectively, make it clear that subrogation is a condition to Nevils' receipt of his FEHBA benefits. Section 2.3(a) provides that, "[b]y enrolling or accepting services under this contract, Members are obligated to all terms, conditions, and provisions of this contract." L.F. 55; 141. Section 2.3(e) provides that, "[a]s a condition precedent to the provision of benefits hereunder," GHP may obtain such information as is "reasonably necessary" to "carry out the provisions of the contract, such as subrogation." L.F. 55; 141-42.

Section 2.5 of each contract addresses the substantive right of subrogation. It provides:

> (a) The Carrier shall subrogate FEHB claims in the same manner in which it subrogates claims for non-FEHB members, according to the following rules:

. . . .

(2) The Carrier shall subrogate FEHB claims if it is doing business in a State in which subrogation is prohibited, but in which the Carrier subrogates for at least one plan covered under the Employee Retirement Income Security Act of 1974 (ERISA) . . . .

L.F. 57; 143. It is uncontested that GHP subrogates for at least one ERISA plan. L.F. 218.

The petition alleges that GHP paid Nevils' medical bills arising from his accident. L.F. 293. His acceptance of those benefits obliged him to accept the subrogation provision and he agreed to provide all information necessary to implement that provision as a condition of receiving benefits. The subrogation provision is unquestionably a condition to the receipt of FEHBA benefits.

Moreover, § 8902(m)(1) includes "payments with respect to benefits" as prompting preemption. A claim to reimbursement of benefits that have already been paid plainly has a connection with a payment in respect of benefits. "In fact, broadly speaking, the subrogation provision is necessarily a product of the benefit payment process." Jacks v. Meridian Res. Co., 701 F.3d 1224, 1233 (8th Cir. 2012). Nevils has never even tried to answer that argument.

Nevils' own definition of "subrogation" confirms that it relates to payments with respect to benefits. The Petition describes GHP's subrogation as "unlawfully asserting reimbursement rights on *healthcare benefits that are paid* pursuant to health plans" and "unlawfully assert[ing] a lien for *repayment of the health care*

benefits paid . . . ." L.F. 290 ¶¶ 6; 7 (emphasis added). Throughout his Petition, Nevils refers to subrogation as "reimbursement for benefits paid" or "repayment of health benefits paid." L.F. 290-291 ¶¶ 9-11. Therefore, according to Nevils' own characterization, the "subrogation" at issue in this case is related to – "has a connection with," to quote Shaw – the benefits GHP paid on Nevils' behalf.

Similarly, Missouri's anti-subrogation rule "relates to" the FEHBA plan that GHP administers. That rule has a connection with the plan because it purports to prevent what the contract requires. That is exactly what § 8902(m)(1) was intended to prevent and Nevils expressly concedes the point. Br. at 10.

The legislative history confirms the breadth of § 8902(m)'s preemption. The original purpose of FEHBA was to "assure maximum health benefits for [federal] employees at the lowest possible cost to themselves and to the government." H.R. Rep. No. 86-957 at 1 (1959), reprinted in 1959 U.S.C.C.A.N. 2913, 2914.

By the mid-1970's, however, states were becoming "increasingly active" in regulating health insurance, often imposing onerous and "conflicting requirements" on FEHBA carriers. S. Rep. No. 95-903 at 3 (1979), reprinted in 1978 U.S.C.C.A.N 1413, 1414-15. The Comptroller General advised that these inconsistent state regulations "could be expected to result in increased premium costs to both the Government and Federal Employees." Id. at 9, reprinted in 1978 U.S.C.C.A.N 1413, 1420.

Thus, in 1978, Congress amended FEHBA to preempt state laws relating to FEHBA benefits. The Senate Report stated that the objective was to secure uniformity of benefits "by providing that the provisions of any contract" under FEHBA "shall supersede and preempt **any** State or local law or regulation that is inconsistent with such contractual provisions." S. Rep. at 2, reprinted in 1978 U.S.C.C.A.N 1413 (emphasis added).

The original section only preempted such laws to the extent they were inconsistent with the FEHBA contract. In 1998, Congress amended § 8902(m)(1) to delete that requirement, thus preempting in toto all state laws that "relate to" FEHBA health insurance:

> Subsection (c) amends section 8902(m) to broaden the preemption of State and local laws with respect to health care contracts under the FEHB program. This amendment confirms the intent of Congress (1) that FEHB program contract terms which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) completely displace State or local law relating to health insurance or plans and (2) that this preemption authority applies to FEHB program plan contract terms which relate to the provision of benefits or coverage . . . .

H.R. Rep. No. 105-374 at 14 (1997). The report also states that preemption "will prevent carriers' cost-cutting initiatives," such as subrogation, "from being frustrated by State laws." Id. at 9.

Like the law in every jurisdiction to consider the issue, Missouri law is crystal clear that § 8902(m)(1) "permits subrogation." Buatte, 939 S.W.2d at 442. Judge Russell's opinion in Buatte holds that "prohibiting Gencare from seeking reimbursement from its insured would clearly differ the extent of coverage or benefits," and hence Missouri's anti-subrogation rule is preempted. Id.

Every case to address the issue has ultimately held that § 8902(m)(1) preempts state anti-subrogation rules. Nevils' suggestion that "other courts across the country soon followed suit in reading FEHBA's preemption . . . to exclude FEHBA insurers claimed contractual rights to subrogation," Br. at 14, is simply incorrect.

Pre-Empire cases holding that § 8902(m)(1) preempts anti-subrogation rules include Medcenters Health Care, Inc. v. Ochs, 854 F.Supp. 589, 593 (D. Minn. 1993), aff'd, 26 F.3d 865 (8th Cir. 1994) ("Minnesota state law is inconsistent with" the subrogation provision in the FEHBA contract "and therefore the contractual provisions preempt and supersede Minnesota state law"); NALC Health Benefit Plan v. Lunsford, 879 F.Supp. 760, 763 (E.D. Mich. 1995), and cases cited in n.3 ("[b]y definition, the reimbursement provision within this Plan 'relate[s] to the nature or extent of coverage or benefits" and therefore "preempts any incompatible state law"); Negron v. Patel, 6 F.Supp. 2d 366, 369 (E.D. Pa. 1998) ("claims under state subrogation statutes . . . present relatively easy cases for preemption"); Aybar v. N.J. Transit Bus Operations, Inc., 701 A.2d 932, 937 (N.J. App. 1997) (New Jersey's "anti-subrogation provision is preempted" by

FEHBA); Thurman v. State Farm Mut. Auto. Ins. Co., 598 S.E.2d 448, 451 (Ga. 2004) (FEHBA insurer "had subrogation liens and w[as] able to enforce them . . . regardless of Georgia's requirement").

Post-Empire cases reaching the same result include Shields v. Gov't Employees Hosp. Ass'n., Inc., 450 F.3d 643, 648 (6th Cir. 2006), overruled on other grounds, Adkins v. Wolever, 554 F.3d 650 (6th Cir. 2009) ("[b]ecause federal law preempts state law, Michigan cannot stop" the FEHBA carrier "from requiring reimbursement"); Blue Cross Blue Shield Health Care Plan of Ga., Inc. v. Gunter, 541 F.3d 1320, 1323 (11th Cir. 2008) ("where the FEHBA is applicable, the Georgia statute is displaced"); Maple v. United States ex rel. Office of Personnel Mgmt., 2010 WL 2640121 (W.D. Okla. June 30, 2010) at *2 & n.2 ("weight of authority" favors "preemption of state law" and Empire "does not mandate a contrary result"); Calingo v. Meridian Res. Co., 2013 WL 1250448 (S.D.N.Y. Feb. 20, 2013) at *4 ("reimbursement and subrogation play an integral role" in FEHBA plan administration "and thus 'relate to' the coverage and benefits of those insured under the program").

These are hardly the only cases to hold that disputes over subrogation are in fact disputes over the terms and conditions of benefits and hence susceptible to preemption. ERISA's preemption clause, 29 U.S.C. § 1144(a), "is similar to section 8902(m)(1)." Hayes v. Prudential Ins. Co., 819 F.2d 921, 926 (9th Cir. 1987), cert. denied, 484 U.S. 1060 (1988). Cases construing § 1144(a) have

uniformly agreed with GHP that disputes about the enforceability of subrogation clauses relate to benefits.

The leading case is Singh v. Prudential Health Care Plan, Inc., 335 F.3d 278 (4th Cir.) cert. denied, 540 U.S. 1073 (2003). Singh held that, for purposes of preemption, a claim "to recover the portion of her benefit that was diminished by her payment to Prudential under the unlawful subrogation term of the plan is no less a claim for recovery of a plan benefit under § 502 than if she were seeking recovery of a plan benefit that was denied in the first place." 335 F.3d at 291.

In Levine v. United Healthcare Corp., 402 F.3d 156 (3rd Cir.), cert. denied, 546 U.S. 1054 (2005), the Third Circuit followed Singh in holding that a claim that plaintiffs' "ERISA plan wrongfully sought reimbursement of previously paid health benefits . . . is for benefits due" under the plan. 402 F.3d at 163. Accord, Arana v. Ochsner Health Plan, 338 F.3d 433, 438 (5th Cir. 2003), cert. denied, 540 U.S. 1104 (2004), and cases there cited (claim can "fairly be characterized . . . as a claim to 'recover benefits due to him under the terms of his plan'"); Wurtz v. Rawlings Co., 2013 WL 1248631 (E.D.N.Y. March 28, 2013) at *9 (plaintiffs "received their medical benefits under health plans that conditioned the receipt of such benefits upon potential reimbursement," and hence their claim "is really about their right to *keep* the monetary benefits received") (emphasis original); Waller v. Hormel Foods Corp., 120 F.3d 138, 139-40 (8th Cir. 1997) (holding that "ERISA preempts any state law that would otherwise override the subrogation

provision" in an ERISA plan because a "subrogation provision affects the level of benefits conferred by the plan").

Nevils argues that, if subrogation is a condition of receiving benefits, every term in the contract is also a condition and the statutory reference to coverage or benefits becomes superfluous. Br. at 25. The subrogation provision is in the section of the contract that deals with benefits, and the provision of information necessary to implement it is an express condition of the receipt of benefits. Whether or not other provisions of the contract are clearly linked to the payment of benefits, the subrogation clause plainly is.

Under the plain terms of § 8902(m)(1) and the contracts, the subrogation requirement is a condition to the receipt of benefits and subrogation derives from the payment of benefits. For either reason, subrogation "relates to" the payment of benefits and FEHBA clearly preempts any contrary state law.

B. The Court Should Defer To OPM's Interpretation Of The Statute It Administers.

During the pendency of this litigation, OPM published a Carrier Letter reiterating its long-standing position that § 8902(m)(1) does preempt state anti-subrogation rules. OPM also filed an amicus brief in the court of appeals in support of GHP's summary judgment and this Court has granted OPM's motion for leave to file a substitute amicus brief. Under both Missouri and federal law, the Court should defer to this administrative interpretation.

In its June 18, 2012 Carrier Letter, OPM advised its Carriers that FEHBA "preempts state laws prohibiting or limiting subrogation and reimbursement." Resp't. App. at A1:

> The carriers' right to subrogation and/or reimbursement recovery is both a condition of, and a limitation on, the payments that enrollees are eligible to receive for benefits; the carrier's contractual obligation to obtain them necessarily relates to the enrollee's coverage or benefits (including payments with respect to benefits) under the FEHB Program. ***These recoveries therefore fall within the purview of the FEHBA's preemption clause, and supersede state laws that relate to health insurance or health plans.***

Id. (emphasis added).

Nevils is correct that the Carrier Letter is not the product of notice and comment rulemaking. Br. at 22-23. But he is quite wrong to suggest that this means it is unworthy of deference. The Supreme Court of the United States "will normally accord particular deference to an agency interpretation of 'longstanding' duration," even when the agency "reached its interpretation through means less formal than 'notice and comment' rulemaking." Barnhart v. Walton, 535 U.S. 212, 220-22 (2002).

Missouri courts have long recognized that informal interpretations of an administrative agency provide invaluable insight into the proper construction of the agency's statute:

> The formal or informal interpretation or practical construction of an ambiguous or uncertain statute or law by the executive department or other agency charged with its administration or enforcement is entitled to consideration and the highest respect from the courts, and must be accorded appropriate weight in determining the meaning of the law.

State ex rel. Danforth v. Riley, 499 S.W.2d 40, 45 (Mo. App. 1973). Accord, State ex rel. Webster v. Mo. Res. Recovery, Inc., 825 S.W.2d 916, 931 (Mo. App. 1992) ("[i]f the agency's interpretation of a statute is reasonable and consistent with the language of the statute, it is entitled to considerable deference"). Empire holds that OPM's interpretation of § 8902(m)(1) is plausible. 547 U.S. at 698.

In Wimberly v. Labor & Indus. Relations Comm'n., 688 S.W.2d 344 (Mo. banc 1985), the issue was whether Missouri's unemployment benefit program complied with federal law as it relates to unemployment caused by pregnancy. The federal Department of Labor issued an interpretive bulletin stating the Department's views on the issue and it certified that Missouri was in compliance. This Court "defer[red] to the interpretation rendered by the agency Congress entrusted with administration of the statute." 688 S.W.2d at 349.

Likewise, federal courts have "long given considerable and in some cases decisive weight" to informal agency interpretations of the statutes they administer. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944):

> [T]he rulings, interpretations, and opinion of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do

> constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . .

Id. Accord, Kasten v. Saint Gobain Performance Plastics Corp., 131 S.Ct. 1325, 1335 (2011).

The Carrier Letter clearly satisfies Skidmore. It concisely explains why subrogation "relates to" the payment of FEHBA benefits and it cites some of the many cases so holding. Resp't. App. at A1-2. The Carrier Letter also recites that OPM has "consistently recognized that the FEHBA preempts state laws that restrict or prohibit FEHB program carrier reimbursement and/or subrogation recovery efforts." Id. at A2.

As Nevils acknowledges, Br. at 20-21, the Court in Calingo initially denied the carrier's motion to dismiss based on the preemptive effect of § 8902(m)(1). After reviewing the Carrier Letter, however, the Calingo Court reversed its prior position and granted judgment for the carrier. It now understood that:

> [T]he enforcement of subrogation and reimbursement provisions in FEHBA contracts is integral to the overall administration of benefits plans under the FEHBP, and thus necessarily 'relate to' benefits or coverage for purposes of triggering FEHBA's preemption provision.

2013 WL 1250448 at *4.

In Blue Cross & Blue Shield of Fla., Inc. v. Dep't of Banking & Fin., 791 F.2d 1501 (11th Cir. 1986), the state's unclaimed property law required FEHBA carriers to remit to the state any FEHBA benefits that had gone unclaimed for seven years. The OPM contract with Blue Cross, however, required Blue Cross to remit those funds to OPM's Special Reserve. The Eleventh Circuit held that OPM's interpretation of § 8902(m)(1) as preempting state law was reasonable:

> OPM, which administers the federal health benefit program, found that preemption of the unclaimed property law was permitted under section 8902(m). Although not conclusive, this interpretation given the statute by the agency charged with its administration is entitled to great deference.

791 F.2d at 1506 (internal punctuation omitted). Accord, Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996) ("[b]ecause the FDA is the federal agency to which Congress has delegated its authority to implement the provisions of the Act, the agency is uniquely qualified to determine whether a particular form of state law . . . should be preempted).

Nevils claims that Calingo recognized that informal agency action is "not entitled to substantial deference." Br. at 21. But the Calingo court actually held that, under Skidmore, "less formal determinations may be entitled to mandatory deference." 2013 WL 1250448 at *3 (internal punctuation omitted).

Nevils also claims that the Carrier Letter is entitled to no deference because it was promulgated during litigation and was "self-serving," in that OPM seeks to

enforce contract terms it drafted. Br. at 23. The practice of including subrogation provisions in FEHBA contracts, however, is a longstanding one. The Carrier Letter states that OPM has "consistently recognized" FEHBA preemption and that it "continue[s] to maintain this position" following Empire. Resp't. App. at A2. Nevils neither explains why a "self-serving" agency interpretation is entitled to no weight nor cites any authority for the proposition, and hence has forfeited the point. State ex rel. Mid-Missouri Limestone, Inc. v. County of Callaway, 962 S.W.2d 438, 441 (Mo. App. 1998).

In any event, the only "self" that a federal agency serves is the public that it represents. OPM is charged with overseeing the FEHBA program, and is responsible for ensuring that FEHBA continues to provide health benefits to federal employees at the lowest possible cost to taxpayers. A position that furthers that goal is in the public interest and is surely entitled to deference.

Even if, as Nevils suggests, an agency action benefiting the public that the agency represents can be characterized as "self-serving," courts nevertheless regularly defer to such "self-serving" agency action. The contract terms enforced in Blue Cross increased OPM's Special Reserve funds, but the Court still afforded them "great deference." 791 F.2d at 1506. When IRS revenue rulings increase the government's revenues, the courts still afford them "substantial judicial deference." Nelson v. C.I.R., 568 F.3d 662, 665 (8th Cir. 2009). OPM's practice of including subrogation provisions in FEHBA contracts is a longstanding policy that supports Skidmore deference.

Nevils' final attempt to discredit the Carrier Letter is that the Letter is "factually inaccurate and misleading" because some FEHBA contracts require that the carrier "shall" subrogate while others provide that it "may" do so. Citing the District Court opinion in Jacks, Nevils claims that this discretion renders the Carrier Letter useless. Br. at 23-24.

The contracts at issue in the case at bar afford GHP no discretion on subrogation. To the contrary, the contracts provide that GHP "shall subrogate" in a given state if it does so for any ERISA plan in that state. It is uncontested that GHP does subrogate for ERISA plans in Missouri, so it must subrogate for FEHBA claims.

Moreover, three of the four firms representing Nevils were counsel of record in Jacks, so they are presumably aware that (1) the Eighth Circuit reversed the District Court's order in Jacks; (2) even the District Court in Jacks questioned the legal significance of the discretion afforded the carrier, App. A019 n. 4; and (3) the Eighth Circuit opinion reversing Jacks characterized the discretion afforded the carrier as "discretion within a minute area" that was legally irrelevant. 701 F.3d at 1234.

The same is true in the instant case; minor variations in contract language make no difference. By operation of § 8902(m)(1), the subrogation requirements in OPM's contracts with its carriers, however worded, relate to "the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)," and so preempt state laws such as Missouri's ban on subrogation.

II. Empire Does Not Require A Contrary Result.

(Responds to pp. 11-17)

Nevils places primary reliance on the Supreme Court's opinion in Empire. Based on certain wording in Empire, he claims that § 8902(m)(1) is an "unusual" preemption clause because it allows contract terms rather than statutes to preempt state law. He claims that, as a result, courts must give the statute a "modest" reading and "cautious" interpretation. Br. at 12-13.

These arguments take Empire completely out of context. The only issue in Empire was subject matter jurisdiction under a theory of complete preemption. In that context, it makes perfect sense to read § 8902(m)(1) modestly and cautiously. Federal courts are "courts of limited jurisdiction," and it is "presumed that a cause lies outside this limited jurisdiction." Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Thus, parties cannot contract to create jurisdiction that is otherwise lacking. CFTC v. Schor, 478 U.S. 833, 851 (1986) ("parties by consent cannot confer on federal courts subject-matter jurisdiction").

The case at bar involves defensive preemption, not complete preemption, and nothing in the Empire opinion suggests that the Court intended to apply a narrow or cramped construction of § 8902(m)(1) in that context. To the contrary, as explained more fully in Point III, there is no presumption against defensive preemption when, as here, there has been a significant federal presence in the field.

Rather, the question of defensive preemption is "one of statutory intent" and the Court starts "with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'' Morales, 504 U.S. at 383. As previously explained, Morales also holds that the phrase "relate to" indicates a broad and expansive preemptive purpose. Id.

The Second Circuit opinion in Empire makes it quite clear that defensive preemption would apply even if there were no federal jurisdiction:

> If, for example, McVeigh were to defend herself in reliance upon a state law that was meant to advance a particular state policy, Empire could argue that such state law – whether statutory or common law – conflicts with federal interests and requires the application of federal common law.

Empire Healthchoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 142 (2d Cir. 2005), aff'd 547 U.S. 677 (2006). That is precisely what Nevils is trying to do – escape his contractual liability to GHP by relying on state law. That is why § 8902(m)(1) preempts his claim.

Nevils suggests that only a statute, rather than a contract, can preempt state law. Br. at 13, citing then-Circuit Judge Sotomayor's opinion for a divided Second Circuit in Empire. Nevils quotes a portion of her opinion (not joined by either of the other Second Circuit judges nor endorsed by the Supreme Court) questioning the constitutionality of § 8902(m)(1), if read as mandating preemption by contract rather than by statute.

Nevils omits the next paragraph of the opinion which makes it clear that it is the statute, not the contract, that preempts:

> Here, we can reasonably construe § 8902(m)(1) as requiring that, in cases involving the terms of any contract under FEHBA which relate to the nature, provision, or extent of coverage or benefits, *federal law* shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance and plans.

396 F.3d at 144 (emphasis original).

In this way, FEHBA is no different in principle than an ERISA plan negotiated between an employer and a labor union. The parties determine the terms of the plan. ERISA then enforces the agreed-upon terms and preempts state law:

> ERISA preempts any state law that would otherwise override the subrogation provision in a self-insured plan such as Hormel's. **A subrogation provision affects the level of benefits conferred by the plan, and ERISA leaves that issue to the private parties creating the plan.**

Waller, 120 F.3d at 139-40 (emphasis added) (citation omitted).

If ERISA preempts state law in enforcing the terms of a privately negotiated contract, surely FEHBA can preempt state law in enforcing a contract with an agency of the federal government. The Supreme Court has recognized the preemptive effect of interactions between an agency and a private party in

other contexts as well. See, e.g., Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) (holding that, in the utility rate-setting area, a tariff set by a private carrier and filed with a federal agency can preempt state law).

Empire's suggestion that § 8902(m)(1) is an unusual provision is empirically wrong. There are essentially identical provisions in numerous other statutes governing benefits for federal employees. E.g., 5 U.S.C. § 8709(d)(1) (life insurance); 5 U.S.C. § 8959 (dental benefits); 5 U.S.C. § 8989 (vision benefits); and 5 U.S.C. § 9005(a) (long term care benefits). These provisions reflect the "overwhelming interest" that the federal government has "in the health and welfare of the federal workers upon whom it relies." Empire, 547 U.S. at 701.

Nevils repeatedly argues that Empire drew a clear distinction between benefits and subrogation. That is incorrect. Empire suggested that such a distinction **might** be drawn for purposes of preemption, but it expressly refused to decide the issue. 547 U.S. at 698. To repeat, Empire specifically found that OPM's and GHP's view of the statute – that subrogation relates to benefits and the payment thereof – was plausible. Id.

If, as Nevils suggests, Empire clearly and unambiguously held that § 8902(m)(1) does not permit defensive preemption of state anti-subrogation rules, one would think that Nevils would cite some cases so holding. With the exception of two since-overruled opinions – one in Calingo and one in a case filed in Jackson County, Missouri – he has not. Every court to address the issue post-

Empire has ultimately agreed with the position that GHP and ACS have taken in this case.

Thus, Nevils' claim that, after Empire, a "near uniform consensus has emerged" that § 8902(m)(1) does not encompass subrogation is exactly backwards. Br. at 13-14. Two of the cases on which Nevils relies – one since overruled – dealt exclusively with complete preemption and federal jurisdiction. Two others, which do address defensive preemption, have also been overruled. The "uniform consensus" supports the defendants, not Nevils.

Nevils principally relies on Blue Cross Blue Shield v. Cruz, 495 F.3d 510 (7th Cir. 2007), which is largely irrelevant. The issue in Cruz was whether the federal courts had subject matter jurisdiction based on FEHBA preemption and, of course, Empire answered that question in the negative. But the opinion specifically recognized that Blue Cross may "start over in state court – where it can if it wishes plead preemption, based on the contract, as a defense to Cruz's [claim]." 495 F.3d at 514.

Nevils also relies on Van Horn v. Ark. Blue Cross & Blue Shield, 629 F.Supp. 2d 905 (E.D. Ark. 2007). Van Horn was also a complete preemption case, not a defensive preemption one. And the Eighth Circuit subsequently overruled it expressly and by name. Jacks, 701 F.3d at 1232.

The final case that Nevils cites for his "emerging consensus" is a case originally filed in Jackson County against Humana. As even Nevils is forced to concede, Br. at 16 n.3, like the Calingo court the Jackson County judge has now

reversed herself and entered summary judgment for Humana based on § 8902(m)(1).

Cruz and Van Horn do suggest that Empire's distinction "between benefits and reimbursements" is relevant to whether there is a uniquely federal interest that supports federal jurisdiction. 495 F.3d at 513; 629 F. Supp. 2d at 912. Both suggest that, while there may be a unique federal interest in uniform *benefits*, there is no unique federal interest in uniform *reimbursements* after subrogation. 495 F.3d at 514; 629 F. Supp. 2d at 912.

The issue here, however, is not whether there is a unique federal interest in uniform reimbursements. The issue is whether subrogation "relate[s] to" benefits or the payment of benefits. Since the promise to reimburse is a condition to the receipt of benefits, it has the requisite connection to benefits. And since subrogation is the recovery of benefits previously paid, it necessarily has a connection to payments with respect to benefits.

Nevils recites a parade of horribles if the Court enforces the plain meaning of the statute. Br. at 15. But that parade has nothing to do with the simple issue here presented. The subrogation provision is a part of the section on benefits and Nevils' cooperation in enforcing it is an express condition on his receipt of benefits. It is impossible to argue – and Nevils does not even try to do so – that the subrogation provision does not have some connection with payments with respect to benefits.

III. There Is No Presumption Against Preemption In A Case Involving The Terms And Conditions Of Benefits To Federal Employees.

(Responds to pp. 7-9; 18-19)

Nevils' only other argument is that there is a presumption against preemption in areas traditionally regulated by the states and that subrogation is one such area. This argument misses the point. Preemption applies to laws relating to FEHBA coverage or benefits, or payments with respect to benefits. The states have never regulated the terms and conditions of federal employee benefits and have no interest in doing so.

The presumption against preemption applies only when the issue involves "a field which the States have traditionally occupied" and in which there is no "history of significant federal presence." United States v. Locke, 529 U.S. 89, 108. The real issue in this case is the conditions for receipt of benefits by federal employees, largely paid for by taxpayers. That is not a field traditionally occupied by the states and it is one in which there is significant federal legislation.

Nevils claims that GHP violated the Missouri Merchandizing Practices Act by seeking reimbursements to which it had no right. But GHP sought reimbursements because the OPM required GHP to subrogate as a condition of Nevils' receipt of benefits – even in states that prohibited subrogation. So, the entity that caused the alleged violation is the federal government.

In these circumstances, there can be no presumption against preemption. The Supreme Court's unanimous opinion in Buckman Co. v. Plaintiffs' Legal

Comm., 531 U.S. 341 (2001), is on point. Plaintiffs in Buckman alleged they were injured by defective bone screws that the Food and Drug Administration (FDA) had approved under the Medical Device Act (MDA). Id. at 346-47. Plaintiffs included a count for fraud, alleging that the defendants had falsely represented to the FDA the intended use of the devices. Id. The Third Circuit held that the MDA did not preempt the fraud claim, but the Supreme Court reversed:

> [T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law. . . . Here, petitioner's dealings with the FDA were prompted by the MDA, and the very subject matter of petitioner's statements were dictated by that statute's provisions. Accordingly, . . . no presumption against pre-emption obtains in this case.

531 U.S. at 347-48.

The same is true here. The relationship between GHP and the OPM is inherently federal. GHP's dealings with Nevils "were prompted by" the OPM, and "the very subject matter" of his claim was "dictated by" the OPM. Id. The subrogation provision is a part of GHP's contract with the OPM, and the "obligations to and rights of the United States under its contracts" are traditionally governed by federal, not state, law. Boyle v. United Techs. Corp., 487 U.S. 500, 504-05 (1988).

Jacks makes it clear that FEHBA involves a "partnership between OPM and private carriers." 701 F.3d at 1233. As a result, "OPM has direct and extensive control over these benefit contracts." Id.:

> At all times, the carrier is subject to OPM oversight, uniquely operates with the United States Treasury, submits to OPM's regulatory requirements, and ultimately answers to federal officers.

Id. at 1233-34. That hardly suggests a presumption that state law should control the relationship.

Moreover, if there were two plausible ways to construe § 8902(m)(1) when the Supreme Court decided Empire, there is only one plausible construction after OPM has clarified its long-standing position. As previously explained, the agency that administers the statute is "uniquely qualified" to determine preemption issues. Medtronic, 518 U.S. at 496.

Numerous policy reasons speak in favor of preemption here. First, the federal government has an "overwhelming interest" in the terms and conditions on which it provides health benefits to federal employees. Empire, 547 U.S. at 701. Thus, "distinctly federal issues are involved" because the proceeds of subrogation benefit the Treasury and GHP's contract is "negotiated by a federal agency and concerns federal employees." Id. at 696.

Second, FEHBA protects the federal taxpayer from subsidizing a double recovery for employees like Nevils. One of the policies underlying Missouri's common law subrogation rule is that the plaintiff, having paid for his or her

insurance, is entitled to the benefit of the bargain. See, e.g., Scroggins v. Red Lobster, 325 S.W.3d 389, 394 (Mo. App. 2010) (Missouri's subrogation rule prohibited health insurer from asserting a lien on plan participant's tort recovery, because "[t]he Participant paid for health care coverage" and "[t]he Insurer was obligated to provide those benefits regardless of whether the Participant pursued her personal injury claim").

That rationale has no application to benefits payable under FEHBA. The federal government pays for about 75% of FEHBA premiums, Empire, 547 U.S. at 684, and subrogation recoveries directly affect the cost of such premiums. Empire, 396 F.3d at 141. It is unfair to ask the taxpayers to subsidize a double recovery for Nevils:

> The federal interest is especially strong because a substantial share of the proceeds of an SGLIA policy may be attributable to general tax revenues.

Ridgway v. Ridgway, 454 U.S. 46, 57 (1981).

Third, allowing subrogation serves the purposes of FEHBA: obtaining "maximum health benefits for [federal] employees at the lowest possible cost to themselves and to the Government." H.R. Rep. No. 86-957 at 4 (1959), reprinted in 1959 U.S.C.C.A.N. 2913, 2916. "[S]ubrogation and reimbursement recoveries serve to lower subscription charges for individuals enrolled in the" FEHBA program. See OPM Carrier Letter, Resp't. App. A1.

As the United States noted in its amicus brief filed in the Court of Appeals:

> Subrogation recoveries from FEHB carriers also tend to reduce the premiums charged both to individuals enrolled in the FEHB program and to the federal government, which pays the bulk of FEHB premiums. The federal government's share of those premiums amounted to approximately $31.5 billion in 2012 alone.

See Amicus Brief of the United States, filed in the Missouri Court of Appeals, ED 98538. at p. 12.

Further, preemption of state subrogation rules also promotes Congress' stated purpose of achieving national uniformity in FEHBA plans:

> A key purpose of § 8902(m)(1) was to "strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," and to "prevent carriers' cost-cutting initiatives from being frustrated by State laws." State antisubrogation laws defeat that purpose because they make entitlement to FEHB benefits depend on state law, even though FEHB beneficiaries may pay the very same insurance premium on a nation- or region-wide basis.

See U.S. Amicus Brief, ED 98538, p. 12, quoting H. Rep. No. 105-374, at 9 (1997).

These distinctly federal interests caution strongly against any presumption in favor of state law. In Boyle, there was no statutory preemption. The Court nonetheless found that federal common law preempted state tort law in the design of military equipment, precisely because that area was "one of unique federal

concern." 487 U.S. at 508. And that concern "changes what would otherwise be a conflict that cannot produce pre-emption into one that can." Id. If anything, given the distinctly federal issues at stake here, the Court should even more readily reject a presumption against preemption, when FEHBA contains an express statutory preemption.

Moreover, Missouri's common law subrogation rule is hardly as strong or rigid as Nevils suggests, and it routinely yields to competing interests. The courts and the legislature in Missouri have carved out numerous exceptions and have allowed insurers and health care payors to subrogate or recover health care payments in numerous circumstances where it would be contrary to the public interest to allow the plaintiff to receive a double recovery. See, e.g., Mo. Rev. Stat. § 379.203.4 (allowing uninsured motorist carrier to assert subrogation rights to insured's personal injury claim); Mo. Rev. Stat. § 287.150 (providing for subrogation of workers' compensation benefits when employee recovers from tortfeasor); Mo. Rev. Stat. §§ 430.230-.250 (exempting hospital liens from subrogation rule). And, of course, preemption by the federal ERISA statute is another "exception" to Missouri's anti-subrogation rule. Hays v. Mo. Highways & Transp. Comm'n., 62 S.W.3d 538, 540 (Mo. App. 2001). The exception created by the FEHBA statute is no different than these other exceptions that Missouri courts have routinely recognized.

Enforcing state law in the face of § 8902(m)(1) would cost the federal government tens of millions of dollars every year. In such circumstances, a presumption against preemption makes no sense.

Conclusion

For these reasons, the Court should affirm the summary judgment in favor of GHP and ACS.

Respectfully Submitted,

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Certificate Of Compliance

I hereby certify pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains **8,088** words, exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Word 2010. The undersigned counsel further certifies that the electronic version of this document has been scanned and is free of viruses.

/s/ Mark G. Arnold

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Certificate Of Service

I hereby certify that on May 23, 2013, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system. I certify that all participants in the case are registered eFiling users and that service will be accomplished by the Missouri eFiling system.

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